

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Bealer v. Warden

No. 2:23-cv-0284-DC-JDP (P), order (E.D. Cal. May 5, 2025) · No. 2:23-cv-0284-DC-JDP (P) · Decided May
5, 2025

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 ANTWOINE BEALER, Case No. 2:23-cv-0284-DC-JDP (P) 12 Plaintiff, 13
v. ORDER 14 WARDEN, et al., 15 Defendants. 16 Pending before the court are plaintiff’s motion
to proceed with discovery and motion for 17 summary judgment. ECF Nos. 27 & 30.

However, because no defendant has been identified or 18 served, and because no scheduling order
has issued, both motions are denied without prejudice as 19 premature. Once plaintiff determines
the identity of defendants, he shall file a motion to 20 substitute the named individual defendants.

After defendants are served, the court will issue a 21 scheduling order, which will include
deadlines for discovery and dispositive motions. 22 Plaintiff has returned to the court subpoenas
directed at discovering the identities of the 23 unknown defendants. ECF No. 23. Since plaintiff is
not proceeding in forma pauperis, the U.S. 24 Marshal will not serve plaintiff’s subpoenas for
free.

See 28 U.S.C. § 1915(d); cf. James v. 25 Scribner, No. 1:04-cv-5878-LJO-DLB P, 2008 WL
3318879, at *1 (E.D. Cal. Aug. 11, 2008) 26 (“As plaintiff is proceeding pro se and in forma
pauperis, he is entitled to service of the subpoena 27 by the United States Marshal [pursuant to 28
U.S.C. § 1915(d)].”). 28 1 Accordingly, plaintiff must either cause each subpoena to be served
himself or bear the 2 | costs of service by the U.S. Marshal.

See Fed. R. Civ. P. 45(b)(1) (“Any person who is at least 18 3 || years old and not a party may
serve a subpoena.”). As for service by the U.S. Marshal, plaintiff is 4 | directed to 28 C.F.R. §
0.114, which sets the fees for such services, including “\$65 per person per 5 | hour for each item
served, plus travel costs and any other out-of-pocket expenses.” Within thirty 6 | days, plaintiff
shall notify the court that he either will or will not use the U.S. Marshal to serve the 7 | subpoenas.

Plaintiff should take note that, if a defendant is not served within the ninety days after 8 |
acomplaint is filed, the court must, after notice to the plaintiff, dismiss the action without 9 |
prejudice. Fed. R. Civ. P. 4(m). 10 Accordingly, it is hereby ORDERED that: 11 1. Plaintiffs
motion to proceed with discovery and motion for summary judgment, ECF 12 | Nos. 27 & 30, are
denied as premature.

13 2. Plaintiff shall, within thirty days, notify the court that he will or will not use the 14 | services
the U.S. Marshal to serve the subpoenas. If plaintiff chooses to have the U.S. Marshal 15 | serve
the subpoenas, he will be obligated to pay the fees as outlined in 28 C.F.R. § 0.114. 16 7 IT IS SO
ORDERED. 18 (1 Oy — Dated: _ May 5, 2025 ow—— 19 JEREMY D. PETERSON UNITED
STATES MAGISTRATE JUDGE 21 22 23 24 25 26 27 28